THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.0097 OF 2011

[Appeal from the judgment of the High Court at Jinja before Hon. Lady Justice Mulyagonja Irene Kakooza dated the 2nd day of February 2010 in Civil Appeal No.003 of 2008]

CORAM: **HON. MR. JUSTICE A.S. NSHIMYE, JA**
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

NANGOBI JANE & 2 OTHERS……..APPELLANTS

V E R S U S

SOPHATIA BEIHI & 3 OTHERS……RESPONDENTS

THE JUDGMENT OF COURT:

This is a second appeal. It is brought against the decision of the High Court sitting at Jinja which partially allowed the appeal against a Judgment and Orders of a Principle Magistrate Grade One sitting at Iganga.

The background to the appeal may be summarised as follows:-

The land in dispute belonged to the 1st respondent. It is situated at Magamaga Trading Centre in Mayuge District with many building on it. The appellants are daughters of the 1st respondent while the 2nd and 3rd respondents are his sons.

Immediately before Christmas in the year 2000, the 1st respondent summoned his daughters, Rose and Jane, who are the 1st and 2nd appellants so that he could introduce them to LCs of the Area because his health was failing and he was very weak. He also requested them to take to him certain commodities for him to use while he was **"still alive"**. They responded to their father's request. On 15/12/2000 at Magamaga, the 1st respondent executed a document in which he **"bequeathed"** to his daughters a piece of land measuring 198 feet, now the land in dispute. By a separate document executed on the same day, he **"bequeathed"** another piece of land measuring 260 x 600 feet to his sons the 2nd and 3rd respondents. The 1st and 2nd appellants took possession of the land given to them by their father and constructed houses thereon. They

left their sister Irene Wambi who is the 3rd appellant in occupation to safeguard the land and building.

In 2005, the 2nd and 3rd respondents instigated by the 1st respondent and together with him sold off the land he had given to the 1st and 2nd appellants to the 4th respondent. Subsequent to the sale, the 4th respondent evicted the 3rd appellant from the premises thereon. The appellants challenged the sale and 4th respondent's possession of the property originally in the Iganga District Land Tribunal but the case was transferred to the Court of the Principal Magistrate Grade One when the operations of the Tribunals were suspended. The Principal Magistrate Grade One gave Judgment in favour of the plaintiffs (the current respondents) and declared that the land in dispute belongs to them. He ordered that a permanent injunction be and was issued against the appellants restraining them from trespassing on the land in dispute and that they pay general and special damages to the respondents for trespass as well as costs of the suit. The Magistrate also ordered that the 4th respondent was entitled to a refund of the money he had paid to the 1st, 2nd and 3rd respondents for purchase of the property.

The appeal to the High Court partially succeeded. The orders of the trial magistrate were set aside and were replaced with the following orders:-

"(a) The 1st and 2nd buildings on the land shall be valued by a competent registered value;

(b) The 4th appellant shall pay to the 1st and 2nd respondents the value of the buildings so assessed;

(c) The parties shall each bear their advocates costs for this appeal."

The appellants appealed against the decision of the High Court. Their grounds of appeal are stated in their amended memorandum of appeal as follows:-

1. **The learned judge on appeal erred in law and fact in finding that the giving of the suit land by the first respondent to the appellants was a bequest and not a gift inter vivos, thereby coming to the wrong decision.**

2. **The learned judge on appeal erred in law and fact when she held that the suit land is not held under customary tenure and**

that the appellants were therefore not protected by the Constitution and Section 27 of the Land Act.

The appellants in this appeal have asked this Court to allow the appeal, set aside the Judgment of the High Court and that of the Court of first instance and restore the land to the appellants. They asked the court to order the respondents to vacate the suit land permanently and asked for costs of the suit in this and the lower courts.

Counsel Joseph Rukanyangira argued the appeal for the appellants. He addressed this court on the six issues that were agreed upon at the scheduling: Counsel Robert Okalany argued the appeal on before of the respondents and addressed the Court on all the issues in reply. We shall consider the submission of both counsel and having reviewed the record and judgment proceed to determine the appeal.

Issue No.1:

The submissions of counsel for the appellants on the first issue which is whether this Court as a second appellate Court can and should re-evaluate the evidence on record. He submitted that this Court as a second appellate Court has the duty to re-evaluate the evidence on

record. He submitted that the 1st appellate Court had failed to evaluate the evidence before and this court should intervene. He was of the position that there was evidence that the 1st respondent gave the suit land to the appellants who are his daughters inter vivos. He invited the daughters introduced them to LCs gave them land and they took possession and developed the land. He submitted that he also gave land to the appellants brothers who sold their land. He submitted that if the first appellate court had properly evaluated the evidence it would have interpreted the word used **"bequeath"** in the right context and found the 1st respondent gave land to his daughters and they took possession and acquired a protectable interest in the land. The land he gave to the girls became their land just like the case for the boys whom he gave the land in similar circumstances.

Counsel Okalany for the respondents on this issue, argued that this court as a second appellate court should handle only matters of law. The evaluation of evidence is strictly restricted to the 1st appellate Court. He submitted that a second appellate Court could only re-evaluate evidence in exceptional circumstances where the first appellate Court had not evaluated or had left out the most important parts of the evidence. His position was that the 1st appellate Court properly evaluated all the evidence. His submission was that the 1st

respondent has bequeathed the land to his daughters. He had a right to take it back when he wanted to.

Issue No.2:

Whether the suit land was given to appellants by way of a bequest or as a gift inter viovs.

Counsel Rukanyagura submitted that the 1st respondent gave his land to his daughters as a gift among the living. It was not a bequest.

Counsel for the respondents agreed with counsel for the appellants that interpretation of the relevant document should be done within the context of the case. He submitted that the 1st respondent, the father of the children was sick, he called his children and he made his will. It was a bequest. It was not a gift inter vivos but a bequest and a person who makes a bequest can within his lifetime withdraw it. The daughters who made developments on the offered land were to get compensation according to the High Court Order.

Issue No.4:

Counsel for the appellants argued that there was no evidence adduced to prove that the land was held under customary tenure but invited court to invoke its powers under s.113 of the Evidence Act and that it was held under customary tenure since it was not held as a lease, mailo or freehold. Counsel for the respondents did not address this issue.

Issue No.5:

Counsel for the appellants argued that the appellants' interest in the land was protected by the Constitution and the law. The 1st respondent treated the appellants in a discriminatory manner. He gave the land to the daughters at the same time that he gave land to the sons as well. He subsequently said to the girls "you are mere girls", and took away the land from the girls and not the boys. The girls were discriminated against.

Counsel argued that he had given the land as a gift inter vivos. The 1st respondent having given the land as a gift cannot revoke the offer he had given

Counsel for the respondents argued that the 1st respondent had the land as his own property. He has a right to decide what to do with it when he is still alive. It is not for courts to determine how people make their wills and how they give out their property. That would be setting a bad precedent. He made a bequeath and he had later changed his mind and that is proper and in his powers.

We shall now proceed to consider the issues that both counsel submitted upon and resolve them.

Issue No.1:

Whether this as a second appellate court can and should re-evaluate the evidence on record.

The law on the powers of a second appellate court to re-evaluate evidence has been handled and resolved in **Pandya v R [1952] EA 336. Ruwala v R 1957 EA 570, Moses Bogere v Uganda Cr. App. No.1/1997(SC), Kifamunte Henry v Uganda, Cr. App. No.10/97. Baguma Fred v Uganda Cr. Case No.7 of 2004** and **Father Nesbensio Begumisa and three Others vs Eris Tibegaga SCCA 17/2002.**

Where the 1st appellate court has failed in its legal obligation to properly re-evaluate evidence on the first appeal that is an error justifying the second appellate court to re-evaluate the evidence and reach its own decision. It is only where the 1st appellate has failed to re-evaluate evidence that it becomes incumbent on this court as a second appellate court to evaluate the evidence.

Counsel for the appellants submitted and illustrated that the 1st appellate court in this case did not properly evaluate the available evidence on record and if it had done so it would have found that the 1st respondent made a gift of his land at Magamaga inter vivos to his daughters (the 1st and 2nd respondents).

The critical question in this case is whether or not 1st appellate Court evaluated the available evidence in order to reach the decision it did reach. We have heard from both counsel for the two parties. We have also studied the evidence on record. We are of the view that if the evidence on record had been properly re-evaluated a different decision would have been reached by the first appellate Court. We now proceed to re-evaluate the evidence on record.

The 1st respondent wrote and invited his daughters to Magamaga and in the presence of other people gave them land. According to the record the 1st respondent, his sons and daughters and elders convened at the sight. The land was measured and the 1st respondent gave one piece to the female off springs and a bigger piece to the male off springs. He later on 15/12/2000 wrote a document (Exp.P1) to reflect what had happened.

Following that the girls who are the respondents took possession of the land measuring 60ft x 198ft and their brothers took possession of another piece of land measuring 260ft x 600ft. Pursuant to another document that was executed on the same day (Ex.P3). The respondents built buildings on the land including tenements. The 3rd respondent lived in one of the tenements and she had a shop in that building. On their part, the 2nd and 3rd appellants sold off the land that was allocated to them.

At the trial what became relevant for interpretation and later on appeal was the offer made to the girls.

The interpreter who was a Court Clerk interpreted the donation as a **"bequest".** Was it a bequest or not? We must note that the

interpreter is only a Court Clerk of no proven interpretation capacity. The 1st respondent is a lay person. The word bequest therefore should be interpreted in the circumstances in which it arose. All the evidence and the circumstances should be looked at together. The donation given to the boys and to the girls was done on the same day at the site where the land was identified in the presence of LCs. Both groups took possession as authorised by the done 1st respondent.

The boys sold the land their father had given to them. The girls build houses on the land their father had given them. Both parties took immediate possession and used the land believing it was their property. If the girls had sold their share like the boys, they would like the boys, have benefited from the sale and this case would not be here.

Their father intended that the girls whom he gave a smaller piece of land should take possession like the boys. When he gave the land to the boys and to the girls they both took immediate possession. He made the offer without stating that either donation would await his death. After offering the land at Magamaga to both the boys and the girls as he wished he shifted to the village.

The evidence on record establishes clearly that the 1st respondent donated his land after taking measurements to the boys and to the girls for each group to take immediate possession and ownership. There was no indication of any intention that ownership or possession was to take effect upon which death. It would be a bequest if that was indicated as his intention. Each group did what it deemed fit with the property they had acquired from their father. The gift of land was a gift inter vivos to both the girls and the boys and the 1st appellate court should have found as the first trial court if it had properly evaluated the evidence. The 1st respondent gave his land to his children whom he clearly put in immediate possession of the land he offered them. This being a gift inter vivos he had no power to revoke it. The property in the land had passed on to both the boys and the girls. He had no more power to take over the land. He could not therefore sell the land to anybody. The sale to the respondents was therefore null and void. They bought no land from the 1st respondent since he was no longer the owner of the land. They acquired no title from that sale. The fourth respondent may recover what he paid for the land from the 1st respondent since he received no land for which he had paid.

After making the finding that we have made on this issue we find that it disposes of the first ground of Appeal. The conclusion of this ground

wholly disposes of the substance of this appeal we do not find it necessary to consider the other issues and ground two of the appeal.

We allow the appeal, set aside the orders of the High Court and make the following orders:-

(1)The suit land belongs to the 1st and 2nd respondents and they should be put into possession of the suit land.

(2)The 1st respondent should refund the money he received from the 4th respondent for the purported sale of the suit land to him.

(3)The respondents shall bear the costs of this appeal and those in the lower Courts.

Dated this day…25th ……of february…….2014.

.....
Hon. Justice A.S. Nshimye
JUSTICE OF APPEAL.

.....
Hon. Justice R. Buteera
JUSTICE OF APPEAL.

.....

Hon. Justice K. Kakuru

JUSTICE OF APPEAL

5